July 19, 2005

Gary W. Sawyers
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Re: Your Request for Advice
Our File No. A-05-123

Dear Mr. Sawyers:

This letter is in response to your request on behalf of the Western Valley Land Conservancy ("Conservancy") for advice regarding the application of the Political Reform Act (the "Act").[1] The Fair Political Practices Commission ("Commission") does not act as a finder of fact when providing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 171.)

QUESTION

Is the Western Valley Land Conservancy a local government agency for purposes of the Act?

CONCLUSION

Yes.

FACTS

You represent the Conservancy, a soon-to-be-formed California public benefit corporation. The Conservancy will be organized exclusively for charitable and educational purposes within the meaning of the Internal Revenue Code section 501(c)(3) and California Revenue and Taxation Code section 23701d. As set forth in the Conservancy's bylaws, the conservancy's specific purposes are:

[1] Government Code sections 81000 – 91014, hereinafter referred to as "sections." Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations, hereinafter referred to as "regulations."

> **"(1) to acquire**, via leases, purchases, joint ventures, options or other vehicles, **lands in the San Joaquin Valley that have been withdrawn from agricultural production** (whether temporarily or permanently) ("Acquired Lands"), including without limitation Acquired Lands within the Westlands Water District; **(2) to develop a comprehensive land use management plan for the Acquired Lands** including the determination of appropriate lands to take title to **and to possibly improve those lands that will provide habitat for various wildlife species; (3) to encourage the use and maintenance of Acquired Lands** in a cooperative manner **that furthers the purposes of the water agencies in which the Acquired Lands are located, including without limitation maintaining and supporting the economic stability of the growers and communities** in the San Joaquin Valley affected by the withdrawal of the Acquired Lands from agricultural production; **and (4) to educate** local, state and federal agencies and the general public **regarding all aspects of agricultural land management, water use and water rights**" (Emphasis added.)

The Conservancy will be governed entirely by a board of directors composed of seven voting members and two non-voting members. The voting members of the Conservancy's board will be: (i) the President of the Board of Directors of the Westlands Water District ("Westlands"), (ii) the General Manager of Westlands, (iii) two individuals that farm land within the boundaries of the Westlands or any other water agency within which the Conservancy owns or leases land, (iv) one Fresno County Supervisor appointed by the Fresno County Board of Supervisors, (v) one Kings County Supervisor appointed by the Kings County Board of Supervisors, and (vi) one individual appointed by the other voting members of the Conservancy Board as a representative of the public from either Fresno County or Kings County. There will also be two non-voting members of the Conservancy's Board; one will be an individual appointed by the California Secretary of Resources and one will be an individual appointed by the United States Secretary of the Interior.

You state that the need for the Conservancy arose because water shortages, regulatory constraints and drainage issues have resulted in the suspension of farming operations on a significant amount of land in Fresno and Kings Counties, particularly within the boundaries of Westlands. You state that proper management of that land is essential to, among other things: (i) protecting surrounding land (still in agricultural production) from weed and pest infestations, (ii) protecting the economic value of that land, thus protecting local economies, and (iii) creating wildlife habitat or putting the fallowed land to other beneficial conservation uses. You state that without an organization such as the Conservancy, fallowed land might not be maintained and no comprehensive program for its management would be developed. The Conservancy is therefore intended to provide a service to water agencies, farmers, affected counties and the San Joaquin Valley generally.

You anticipate that, at least initially, a significant portion of the Conservancy's funding will come from the Westlands or other public agencies. However, you also anticipate that over time the Conservancy will become self-funding via private contributions, grants and other revenue sources. You state that the Conservancy will be organized as an independent body and will not be controlled by any other public agency or organization. You state that the composition of the Conservancy's Board of Directors has been arranged to reflect the interests it will benefit in Fresno and Kings counties.

You wrote:

> "The impetus for establishing the Conservancy began with Westlands, which is retiring significant acreage within its own boundaries to address water supply and drainage issues. Westlands will likely convey land to the Conservancy to manage, and will provide much of the start up funding for the Conservancy. Two of the Conservancy's Board members will be associated with the [Westlands] District. However, as noted above, the real impetus for the Conservancy is the broader trend of agricultural properties in Fresno and Kings Counties going fallow because of water supply and drainage impacts, and the regional need to manage those lands.
>
> "Moreover, the land provided to the Conservancy by Westlands will simply be a bi-product of that agency's program to acquire water for the farmers it serves and provide drainage relief by retiring land. Fallowed land is not the aim of Westlands' land retirement program (which is designed to reallocate water supplies and address drainage concerns), but rather is merely the result of that program. Further, private lands outside of Westlands also suffer from drainage problems and water shortages, and the Conservancy will pursue acquisition of those lands as well. . . .[¶]
>
> "[A]t least initially the primary source of funding for the Conservancy will be Westlands. That said, the goal of the Conservancy is to be self-sufficient by deriving its funding from both public and private sources. . . . Even if the Conservancy does receive public funds through grants or other public programs, the Conservancy will have to compete with other private and public candidates for those funds. . . .[¶]
>
> "[T]he Conservancy will be performing services and undertaking obligations that public agencies have historically performed, but which have also been historically performed by private parties. . . .[¶]
>
> "The Conservancy is established as a nonprofit public benefit corporation under Internal Revenue Code section 501(c)(3) and California

> Revenue and Taxation Code section 23701d for charitable and educational purposes only. . . . [T]he Conservancy is not dedicated to serve any particular public agency, but rather a broad public purpose serving the public in general and hopefully many public agencies. . . .[¶]
>
> "The only statutory schemes appearing to consider the Conservancy public are the Brown Act and the Public Records Act. . . . [¶]
>
> "Significantly, under Government Code section 1090 the Conservancy would not be considered a public agency. The definition of 'district' in Section 1090 means 'any agency of the state formed pursuant to general law or special act, for the local performance of a governmental or proprietary functions within limited boundaries.' An independent private, nonprofit public benefit corporation is not an agency of the state, nor are its board members public officers, as there has been no public office created by their being on the board. See *Pacific Finance Corporation v. City of Lynwood* (1931) 114 C.A. 509; see also 44 Ops. Atty. Gen. 37."

ANALYSIS

A. Determining What Entities, Generally, Are Subject To The Act

The Act prohibits a public official from making or participating in making a governmental decision in which the official knows or has reason to know he or she has a financial interest. (Section 87100.) These conflict-of-interest provisions of the Act apply only to "public officials." A "public official" is defined as every member, officer, employee or consultant of a state or local government agency. (Section 82048.)

In addition, section 87300 of the Act states that "every agency shall adopt and promulgate a Conflict of Interest Code" applicable to its "designated employees." For purposes of the Act, "agency" is interpreted to mean any state agency or local government agency. (Section 82003; *Maas* Advice Letter, No. A-98-261.) A "state agency" is defined in the Act as "every state office, department, division, bureau, board and commission, and the Legislature." (Section 82049.) A "local government agency" is "a county, city or district of any kind including school district, or any other local or regional political subdivision, or any department, division, bureau, office, board, commission or other agency of the foregoing." (Section 82041.)

In two opinion letters issued by the Commission nearly 30 years ago, the Commission first set out a four-factor analysis to aid in the determination of when an organization is deemed to be an "agency" regulated under the Act.

In the first opinion, *In re Siegel*, the Commission determined that the Pico Rivera Water Development Corporation, a nonprofit corporation, was a local government agency

subject to the Act. (*In re Siegel* (1977) 3 FPPC Ops. 62.) The Pico Rivera Water Development Corporation was founded to acquire, maintain, and operate a water system for the City of Pico Rivera. In analyzing whether the Pico Rivera Water Development Corporation was an agency subject to the Act, the Commission set forth four criteria to consider:

> (1) Whether the impetus for formation of the entity originated with a government agency;
>
> (2) Whether the entity is substantially funded by, or its primary source of funds is, a government agency;
>
> (3) Whether one of the principal purposes for which the entity was formed is to provide services or undertake obligations which public agencies are legally authorized to perform and which, in fact, they traditionally have performed; and
>
> (4) Whether the entity is treated as a public entity by other statutory provisions.

In *Siegel*, the Commission found that, first, the Pico Rivera city council was intimately involved in the formation of the Pico Rivera Water Development Corporation, and that the city council had the right to disapprove the name of anyone submitted to serve on the board. Second, with respect to funding, the city was required to pay rent to the corporation until the corporation's bonds were retired, even if receipts from the operation of the water system were not sufficient to meet these costs – in essence, guaranteeing the bonds. Third, there was more evidence that the corporation was fulfilling a public function because the water system was to be operated solely by city employees. Further, the opinion considered it significant that the acquisition and operation of a water system is a service commonly provided by municipalities in their public capacities. Fourth, the corporation's bonds enjoyed the same legal status as those issued by a public body under California's tax and securities laws. Accordingly, the Commission concluded that the Pico Rivera Water Development Corporation was intrinsically "public" in character and therefore subject to the Act.

Subsequent advice letters issued by the Commission have opined that it is not necessary that all four of the criteria be satisfied for an entity to be considered a local government agency. (*In re Vonk* (1981) 6 FPPC Ops. 1; *O'Shea* Advice Letter, No. A-91-570.) It is only necessary that the entity satisfy enough of the four criteria for its overall character to correspond to that of a local government agency. (*Rasiah* Advice Letter, No. A-01-020.)

In 1978, the Commission used the same four criteria to determine that the Bakersfield Downtown Business Association, a nonprofit corporation, and the Chamber of Commerce were not "local government agencies" that were required to adopt a

conflict of interest code. (*In re Leach* (1978) 4 FPPC Ops. 48.) The question centered around whether the two, previously-created Bakersfield entities had become "agencies" subject to the Act because they had entered into contracts with the City of Bakersfield to administer a business promotion district, to operate a convention bureau, and to conduct a survey for the purpose of promoting immigration.

In *Leach*, supra, the Commission determined that the two Bakersfield entities had not been transformed into "agencies" under the Act because of the contracts they entered into with the City of Bakersfield. First, the formation of the business association and chamber of commerce existed well before the contracts at issue came into existence, and so the impetus for their creation was not triggered by the city. Second, both entities were funded by private sources and only received an amount of money from the city equal to that necessary to reimburse the entities for their work under the contracts. Third, though the two entities did engage in business promotion activities that are sometimes conducted by cities, the entities at issue performed services which "more specifically benefit the downtown business area and retail stores, restaurants, and hotels located throughout the City." (*Leach*, at p.4.) Fourth, though the entities enjoyed special tax status, neither was viewed as public in nature by the tax laws.

In the *Vonk* opinion, supra, the Commission was faced with a different question – whether the Act's conflict of interest code provisions applied to a statewide agency that was created by the Legislature, but which functioned similar to a private insurance company. (*In re Vonk* (1981) 6 FPPC Ops. 1.) State Compensation Insurance Fund ("SCIF"), the statewide agency in question, made three arguments as to why it was outside the purview of the Act. First, SCIF argued that based on Insurance Code section 11873, it was exempt from all requirements applicable to state agencies generally. Second, SCIF argued that it was not an "agency" according to Commission regulation 18249 (defining "state agency" for lobbying purposes), and the *Siegel* and *Leach* criteria. Finally, SCIF argued that it did not make "governmental decisions" within the meaning of the conflict-of-interest provisions of the Act.

Despite the fact that the SCIF operated competitively in the private market dealing in workmen's compensation insurance, the Commission concluded that it was a state agency required to adopt a conflict-of-interest code pursuant to the Act. The *Vonk* opinion stated:

> "In *Siegel* and *Leach* we did isolate a number of specific criteria which we thought helpful to determine whether ostensibly private entities were truly public in nature. [¶] These criteria, however, were not intended to be viewed as constituting a litmus test for determining whether an entity is public for purposes of the Political Reform Act. Indeed, it seems to us that criteria necessary to determine when private entities become so suffused with attributes of sovereignty as to be considered public in nature, are simply not necessary to determine whether an entity specifically authorized by the state

> constitution is a public agency. In the case of the Fund, we believe its constitutional provenance makes it absolutely plain that the Fund is public in nature." (*Vonk, supra*.)

B. Applying The *Siegel/Leach* Factors To Non-Profit Entities

You state that the Conservancy will be created as a "public benefit corporation . . . organized exclusively for charitable and educational purposes." The Commission has addressed whether a nonprofit entity, such as the Conservancy, is deemed to be a public entity under the *Siegel* analysis in a number of advice letters.

A somewhat analogous situation to the Conservancy is found in the *Kahoe* letter. (*Kahoe* Advice Letter, No. A-02-171.) In *Kahoe*, the San Joaquin Valley Water Coalition, a nonprofit entity, was found to be subject to the Act. The purpose of the coalition was, generally, to support and to promote research and education relating to the availability, use and conservation of water resources in the San Joaquin Valley.

First, the impetus for the coalition was prompted through discussions among various community groups including farmers, businesses, cities, and water districts. Second, the coalition was funded by both public and private sources. Most recently, the coalition had received approximately 25% of its funding from private sources; the year prior, over half of its funding came from private sources. Third, the coalition's purpose of developing water policy recommendations for the benefit of the San Joaquin Valley as a whole was determined to be a function traditionally performed by public agencies. In addition, the coalition was distinguished from the downtown business association and chamber of commerce discussed in *Leach*, *supra*, because the coalition had purposes specified in its bylaws related to water resources and use practices which were meant to benefit the public as a whole and did not have the purpose of simply promoting the interests of a particular group of private interests. Fourth, the fact that the coalition's board meetings were to be held in accordance with the Brown Act gave weight to the conclusion that it should be treated as a public entity.

Other advice letters have applied the *Siegel* factors to other types of nonprofit entities. For example, in the *Steele* Advice Letter, No. A-04-072, the Universal Pre-School Corporation was determined to be subject to the Act when three out of four of the *Siegel* criteria had been met. The Los Angeles County Children and Families First Proposition 10 Commission, a public agency, planned to establish this nonprofit. The primary source of funding was to be from the Proposition 10 Commission, even though private funding was hoped for in the future. The nonprofit was to operate a preschool program which was a function typically carried out by government agencies. Though it was not known whether the entity was going to be treated as a public entity under open meetings and public records laws, the fact that the fourth criterion could not be determined did not undermine the conclusion that entity was considered to be subject to the Act.

In the *Stark* Advice Letter, No. A-03-015, the South Coast Community Media Access Center ("CMAC"), a nonprofit corporation, was not considered to be a government agency under the Act but was considered to be "a close case." The impetus prompting the formation of CMAC was a private cable operator's desire to divest itself of responsibility for public access channels, although the City and County of Santa Barbara were closely involved in the process. Though the source of funding for CMAC was mixed, its primary source of funding was deemed to be the local private cable company. CMAC's board of directors had no elected officials or persons appointed by, or otherwise controlled by, the city or county. The letter concluded that CMAC's service of operating a public access channel was not a service that government agencies traditionally perform. The fact that CMAC was treated like a public entity under certain statutory provisions was found not to be essential and did not change CMAC's intrinsic non-governmental character as determined in the overall analysis.

C. Application of the *Siegel* Criteria To The Western Valley Land Conservancy

Following the Commission's opinions and advice letters, we apply the *Siegel* test to what you have told us about the Conservancy, as a starting point for determining whether it should be considered an agency subject to the Act.

1. What is the impetus for formation of the entity?

Generally, the first criterion of the *Siegel* test is met where "the impetus for formation of the corporation originated with a government agency." (*Siegel*, p. 4; see also *Maas, supra*; *Moser* Advice Letter, No. A-97-400a.) In your letter you state that "the need for the Conservancy arose because water shortages, regulatory constraints and drainage issues have resulted in the suspension of farming operations on a significant amount of land in Fresno and Kings Counties, particularly within the boundaries of Westlands. *The impetus for establishing the Conservancy began with Westlands*, which is retiring significant acreage within its own boundaries to address water supply and drainage issues." (Emphasis additional.)[2]

In addition, contrary to the entities in *Leach*, supra, the Conservancy's existence will not precede its receipt of public funding for discreet projects contracted for by a government entity. Therefore, the impetus for the creation of the Conservancy originated with Westlands Water District – a government entity.

[2] At one point, you write that the creation of the Coalition is really being driven by a "broader trend of agricultural properties in Fresno and Kings counties going fallow because of water supply and drainage impacts, and the regional need to manage those lands." Even more striking is that, unlike the facts in the *Kahoe* letter, *supra*, there is no indication that private interests were any material part of the Conservancy's creation. It is also noteworthy that of the nine positions on the Conservancy's board, six will be occupied by people who work for or represent government agencies.

> 2. Is the entity substantially funded by, or is its primary source of funds, a government agency?

The answer to this question is yes. You wrote that at least initially, a significant portion of the Conservancy's funding will come from Westlands or other public agencies. Though you anticipate that over time the Conservancy will become self-funding via private sources, at this point, such private funding is an expectancy at best. (See *Steele* Advice Letter, *supra*.) Also, as we have seen under the facts presented in the *Kahoe* letter, even 25% to over 50% private funding will not necessarily exempt an entity from being deemed a government agency subject to the Act. Therefore, this criterion is met.

> 3. Is one of the principle purposes for which the entity is formed to provide services or undertake obligations that public agencies are legally authorized to perform and which, in fact, they traditionally have performed?

In the *Kahoe* letter, the San Joaquin Valley Water Coalition's purpose of developing water policy recommendations for the benefit of the San Joaquin Valley as a whole was determined to be a function traditionally performed by public agencies. In addition, the coalition was distinguishable from the downtown business association and chamber of commerce discussed in *Leach, supra*. The coalition in *Kahoe* had purposes specified in its bylaws related to water resources and use practices which were meant to benefit the public as a whole. Contrary to the *Leach* entities, the coalition in *Kahoe* did not have the purpose of specifically promoting the interests of a particular group of private interests which simply had a secondary effect of benefiting the city where those private interests conducted business.

We find that the purposes of the Conservancy are very similar to the coalition analyzed under *Kahoe* based upon the excerpt of the Coalition's bylaws you provided in your correspondence. Agricultural land management (which is closely related and inextricably tied to water use, water rights and wildlife maintenance policies) is typically a government function. (See *Kahoe, supra*.) Though one purpose of the Conservancy is to support "the economic stability of the growers," this appears to be an incidental, general purpose overshadowed by its public policy component. (*Cf. Leach, supra*.)

The development and maintenance of agricultural land management, water, and wildlife policy are common purposes behind several government agencies referred to as "conservancies." For example, in statutes governing California's State Coastal Conservancy, the Legislature declared "that the agricultural lands located within the coastal zone contribute substantially to the state and national food supply and are a vital part of the state's economy." (Public Resources Code section 31050; see also Pub. Res. C. sections 31051—31054, and 31150 [regarding preservation and management of vacant lands and important fish and wildlife habitats].)

The State Coastal Conservancy, and other conservancies in the state, have similar purposes and are all deemed "agencies" subject to the Act. (*Knight* Advice Letter, No. A-99-165; see also Pub. Res. C. sections 32500 et seq. [the San Joaquin River Conservancy], 33000 et seq. [Santa Monica Mountains Conservancy], Government Code sections 66905 et seq. [California Tahoe Conservancy].) Therefore, it appears that the Conservancy satisfies the third *Siegel* factor by providing a traditional government function.

4. Is the entity treated as a public entity by other statutory provisions?

The Conservancy, according to your analysis and similar to the facts under *Kahoe*, is subject to both the Brown Act and the Public Records Act. In light of this fact and others, your conclusion that the Conservancy would not be subject to section 1090 (right or wrong) is not conclusive to the remainder of our analysis.

In *Kahoe, supra*, the entity in question was found to be subject to the Brown Act. In *Steele* and *Stark, supra*, whether the entities being analyzed were treated like public entities under certain statutory provisions was found not to be essential to the analyses. The undetermined nature of the fourth criterion did not change the intrinsic character of the entities under examination, as determined by the overall analyses under the three other criteria. Specifically, in *Steele, supra*, even though it could not be determined as to whether the entity was subject to the state's open meetings and public records laws, the fact that the fourth *Siegel* criterion was not satisfied did not undermine the conclusion that entity was considered to be subject to the Act.

Assuming for the sake of argument that your conclusions are correct regarding the application of open meetings and public records laws (but not section 1090) to the Conservancy; the fourth criterion could still be deemed to have been met. Furthermore, even if we assumed that the fourth *Siegel* criterion were not met under these circumstances, prior advice letters indicate that this failure can still result in the entity being subject to the Act. (See *Steele, supra*.)

Based upon these past analyses, we believe that the Conservancy's being subject to the state's open meetings and public records laws (but not section 1090) weighs in favor of meeting the fourth criterion.

D. Conclusion

Therefore, the Conservancy has met all four factors of the *Siegel / Leach* analysis and is a government "agency" subject to the Act.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel

By: Andreas C. Rockas
Counsel, Legal Division

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